UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAPTIST HEALTH NURSING AND REHABILITATION CENTER, INC.

and **Cases 03-CA-153365**
03-CA-160251

1199 SEIU UNITED HEALTHCARE WORKERS EAST

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE AND ISSUES PRESENTED 1
II. BACKGROUND AND INTRODUCTION 2
A. Relevant Background 2
1. Respondent suspended and terminated Carmel Sparks, without providing the Union notice and an opportunity to bargain. 2
2. Respondent suspended and terminated Yadira Lambert, without providing the Union notice and an opportunity to bargain. 4
B. Introduction 7
III. ARGUMENT 8
A. The ALJ Failed to Perform a Witness Credibility Analysis. (Exception 1) 8
B. Respondent's Suspension and Discharge of Carmel Sparks and Yadira Lambert Violated Section 8(a)(5) and (1) of the Act. (Exception 2) 9
1. The ALJ Erred in Failing to find a Violation Based on Board Precedent Independent of *Alan Ritchey* 9
2. The ALJ Erred in Failing to Apply the Rationale of *Alan Ritchey* to find that the disciplines issued to Carmel Sparks and Yadira Lambert violated the Act. 11
C. The ALJ Failed to Decide Whether the Disciplines issued to Carmel Sparks and Yadira Lambert were Discretionary. (Exception 3) 15
D. The ALJ Failed to Decide Whether an Administrative Suspension is Discipline. (Exception 4) 17
E. Carmel Sparks and Yadira Lambert are entitled to Reinstatement and a Make-Whole Remedy and the ALJ should have made that Determination. (Exceptions 5-6) 18
1. Board Precedent Requires a Make-Whole Remedy. (Exception 5) 18
2. The Make-Whole Remedy Should Include Reimbursement for All Search-For-Work and Work-Related Expenses, Regardless of Whether Interim Earnings were in Excess of these Expenses during the Backpay Period. (Exception 6) 21
IV. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Adair Standish Corp., 292 NLRB 890 (1989) 10
Aircraft & Helicopter Leasing, 227 NLRB 644 (1976) 21
Alan Ritchey, Inc., 359 NLRB No. 40 (Dec. 14, 2012) ..... passim
Alcon Fabricators, 334 NLRB 604 (2001) 8
Alpha-Omega Electric, Inc., 312 NLRB 292 (1993) 8
Alta Vista Regional Hospital, 355 NLRB 265 (2010) 19
Beacon Piece Dyeing and Finishing Co., Inc., 121 NLRB 953 (1958) 20
Berthold Nursing Care Center, Inc., 351 NLRB 27 (2007) 18
Bryant & Stratton Business Institute, 321 NLRB 1007 (1996) 9
Carey Salt Co., 358 NLRB No. 124 (Sept. 12, 2012) 19
Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees, 348 NLRB 47 (2006) 21
Coronet Foods, Inc., 322 NLRB 837 (1997) 21
Crossett Lumber Co., 8 NLRB 440 (1938) 21
D.L. Baker, Inc., 351 NLRB 515 (2007) 21
Deena Artware, Inc., 112 NLRB 371 (1955) 21
Die Supply Corporation, 160 NLRB 1326 (1966) 20
Don Chavas, LLC, 361 NLRB No. 10 (Aug. 8, 2014) 23
Eugene Iovine, Inc., 328 NLRB 294 (1999) 10
Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 360 NLRB No. 73 (April 14, 2014) 21
Ferguson Enterprises, Inc., 349 NLRB 617 (2007) 19
Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) 10, 19
Goya Foods of Florida, 356 NLRB No. 184 (2011) 14
Hobby v. Georgia Power Co., 2001 WL 168898 (Feb. 2001) 23
In Re Midwestern Pers. Servs., Inc., 346 NLRB 624 (2006) 22
In Re N.K. Parker Transportation Inc., 332 NLRB 547 (2000) 10
Jackson Hosp. Corp., 356 NLRB No. 8 (Oct. 22, 2010) 22, 23
JD(ATL)–02–15, 2015 WL 400624 (N.L.R.B. Div. of Judges) (Jan. 29, 2015) 14
Kitsap Tenant Support Services, Inc., JD(SF)–29–15, 2015 WL 4709436 (N.L.R.B. Div. of Judges) (July 28, 2015) 13
K-Mart Corp. v. NLRB, 62 F.3d 209 (7th Cir. 1995) 8
Knickerbocker Plastic Co., Inc., 104 NLRB 514 (1953) 23
LaGuadia Associates, 357 NLRB No. 95 (2011) 18
Latino Express, Inc., JD(SF)-09-15, 2015 WL 1205363 (N.L.R.B. Div. of Judges) (March 17, 2015) 13
Lewin v. Schweiker, 654 F.2d 631 (9th Cir. 1981) 8
Mercy Hospital of Buffalo, 311 NLRB 869 (1993) 9
N. Slope Mech., 286 NLRB 633 (1987) 21
NLRB v. Cutting, Inc., 701 F.2d 659 (7th Cir. 1983) 8
NLRB v. Katz, 369 U.S. 736 (1962) 9
NLRB v. Noel Canning, 134 S.Ct. 2550 (2014) 11
Oneita Knitting Mills, 205 NLRB 500 (1973) 10
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 22

Pressroom Cleaners & Serv. Employees Int'l Union, Local 32bj, 361 NLRB No. 57 (Sept. 30, 2014) 22
Rainbow Coaches, 280 NLRB 166 (1986) 21
Rice Lake Creamery Co., 151 NLRB 1113 (1965) 21
Ridgewood Health Care Center, Inc., JD-20-15, 2015 WL 1440964 (N.L.R.B. Div. of Judges) (March 27, 2015) 13
SMG Puerto Rico II LC, JD(ATL)-07-15, 2015 WL 1756217 (N.L.R.B. Div. of Judges) (April 17, 2015) 13
St. Francis Medical Center, 347 NLRB 368, (2006) 8
TGF Management Group Holdco Inc., JD(NY)-05-15, 2015 WL 194519 (N.L.R.B. Div. of Judges) (Jan. 15, 2015) 13
The Fresno Bee, 339 NLRB 1214 (2003) 13
Uniserv, 351 NLRB 1361 (2007) 19
W. Texas Utilities Co. 109 NLRB 936 (1954) 21
Washoe Medical Center Inc., 337 NLRB 202 (2001) 10
Western Cab Company, JD(SF)-33-15, 2015 WL 5159229 (N.L.R.B. Div. of Judges) (Sept. 2, 2015) 13, 15

Other Authorities

Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, available at 1992 WL 189089 (July 14, 1992) 23
Legal Research, Writing and Civil Litigation, National Paralegal College 12

I. STATEMENT OF THE CASE AND ISSUES PRESENTED

On March 11, 2016, Administrative Law Judge Geoffrey Carter (ALJ) issued his Decision in these cases. Counsel for the General Counsel respectfully submits this brief in support of the Exceptions to the ALJ's Decision, which is being filed simultaneously herewith. The issues presented herein are whether the ALJ erred in his Decision by:

A. The ALJ's refusal to perform an explicit credibility analysis of the witnesses. (ALJD 8:21-23).[1]

B. Failing to find that Respondent's suspension and termination of Carmel Sparks and Yadira Lambert violated Section 8(a)(1) and (5) of the Act. (ALJD 10:1-7).

C. Failing to determine whether the disciplines Respondent issued were discretionary. (ALJD 8:37-38).

D. Failing to determine whether administrative suspensions are disciplinary. (ALJD 8:37-38).

E. Failing to analyze and order an appropriate make-whole remedy for Carmel Sparks and Yadira Lambert including reinstatement and backpay, for Respondent's violations of Section 8(a)(1) and (5) of the Act. (ALJD 10:20)

F. Failing to require that Respondent reimburse Carmel Sparks and Yadira Lambert for all search-for-work and work-related expenses regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. (ALJD 10:20).

[1] Throughout this brief the following references will be used: ALJD ___:___ for the Administrative Law Judge's Decision at page(s):line(s); GC Ex. ___ for General Counsel's exhibit; R. ___ for Respondent's exhibit; Tr. ___ for transcript page(s); and Supp. Tr. ____ for supplemental transcript page(s).

II. BACKGROUND AND INTRODUCTION

A. Relevant Background

Baptist Health Nursing and Rehabilitation Center, Inc. (Respondent) is a corporation engaged in the operation of a nursing home. (GC Ex.1[j]). On April 24, 2015,[2] an election was held between the Union and Respondent where the employees overwhelmingly elected the Union as their representative. (Tr. 29, 115). On May 4, the Union was certified as the employee's elected bargaining representative. (ALJD 3:8-17, Tr. 29, GC Ex. 2). Bargaining for the first collective-bargaining agreement between the parties commenced in about July. (ALJD 3:19-20, Tr. 29, 116, 151). There have been approximately six bargaining sessions, but to date, no agreement has been reached. (ALJD 3:20-21, Tr. 29, 116, 151, 269-70). Similarly, no interim grievance or arbitration procedure has been established. (ALJD 3:20-21, Tr. 151).

1. Respondent suspended and terminated Carmel Sparks, without providing the Union notice and an opportunity to bargain.

Respondent hired Carmel Sparks in April 2014 as a per diem certified nursing assistant (CNA). (Tr. 47). Sparks was assigned to work the day room on May 15. (Tr. 47). The day room is where residents congregate. (Tr. 47-48). Both CNAs and LPNs can supervise residents in the day room. (Tr. 95). LPN Charge Nurse Karen Comerford approached Sparks during her shift and asked her to turn off the television and play music in the day room instead. (Tr. 48). After playing approximately six songs Sparks turned the television on again. (Tr. 48-49). Comerford came into the day room yelling and aggressively putting her hands in Sparks' face. (Tr. 49). Sparks approached Sherri Martone, the supervisor on duty, and gave a statement about what occurred. (Tr. 49-50; GC Ex. 5). Sparks felt uncomfortable returning to the unit where Comerford was still working and told Martone as much. (Tr. 54, 319). Martone told her there

[2] All dates are in 2015 unless otherwise noted.

were no other units available. (Tr. 54). When Sparks indicated she was going to leave the facility, Martone raised no objections. (Tr. 54). Sparks was not immediately terminated for the incident on May 15; rather, she worked a few days after the incident. (ALJD 4:28-40; Tr. 240-41).

On May 20, Sparks approached Human Resources and spoke to the Human Resources Director, Jonathan "Pete" Steffan to start the process of resolving the issue between herself and Comerford. (Tr. 54-55, 160). At that time, Steffan was unaware of what had occurred on May 15. (Tr. 55, 160, 241). There was no discussion about terminating her employment. (Tr. 179, 242). However, as a result of the conversation between Steffan and Sparks on May 20, Sparks was suspended without pay to allow Respondent time to investigate the May 15 incident. (ALJD 4:42 – 5:1; Tr. 57-58, 64, 243).

After his meeting with Sparks, Steffan performed an investigation. (Tr. 180). In fact, as part of his regular duties Steffan performs disciplinary investigations and has input on employee disciplines. (Tr. 150-51). During this investigation, he reviewed witness statements, spoke to witnesses, and reviewed security camera footage. (ALJD 5:4-7; Tr. 161-62, 175, 180-181, 277, 286). Steffan performed an investigation because "there were some questions of fact here" that Respondent "would need to take some time to look into." (Tr. 179, 242). He also performed an investigation because he and the director of nursing had to determine whether Lambert had good cause to leave her shift. (Tr. 239).

Sparks was recalled to work on May 25, for about a half an hour until she was told that her being scheduled was a mistake and the director of nursing was sending her home to continue her unpaid suspension. (Tr. 60; GC Ex. 6). In total, Sparks missed approximately five days of work because of her unpaid suspension. (Tr. 64). Steffan claims that "we, after investigation,

found that she had walked off the job mid-shift without good cause violating our attendance policy on leaving the building without following the proper procedure." (Tr. 159). Following proper procedure involves informing someone in management of their departure. (Tr. 238). Respondent admits that it ultimately terminated Sparks on about June 2. (ALJD 5:7-15; Tr. 47, 64, 66, 184; GC Ex. 1[o]).

The ALJ correctly found that Respondent failed to notify or seek to bargain with the Union about the suspension or termination that Sparks received. (ALJD 5:17-18; Tr. 269-70; GC Ex. 1[o]).

2. Respondent suspended and terminated Yadira Lambert, without providing the Union notice and an opportunity to bargain.

Respondent hired Yadira Lambert as a full-time CNA on June 9, 2014. (Tr. 73, GC Ex. 8). On June 1, Lambert was called to an impromptu meeting at the nurses' station. (Tr. 74). During the meeting, Lambert's supervisor, Laura Shinn, directed her to go home for failure to make adequate eye contact during the meeting. (Tr. 74). Lambert was not making eye contact because she was reviewing her assignment sheet. (Tr. 74). After informing her fellow CNAs about the status of her residents to ensure they would be taken care of, Lambert left the unit as instructed. (Tr. 75). While Lambert was waiting in the lobby for her ride, Shinn appeared and told her to go wait outside and stand in the rain, or else security would be called. (Tr. 75). Steffan testified that he advised the director of nursing "she needed to investigate it, find out what happened, find out if there was just cause for the incident to happen." (Tr. 202). Lambert was suspended without pay pending the investigation from June 1 until approximately June 19. (Tr. 76-77, 203, 246, 248, 254; GC Ex. 10). During that time, Respondent was investigating the allegation of her insubordination. (Tr. 247). Insubordination is included in the employee

handbook as conduct that results in immediate termination. (R. Ex. 3). Despite being recalled to work, Lambert was never paid for the time she missed. (ALJD 6:35-42; Tr. 203).

Lambert worked without issue from her return on about June 19, until Respondent terminated her on August 3, for allegedly having two no call/no shows within a one year period. (Tr. 78, 205-06). The first alleged no call/no show occurred on April 26. (Tr. 263, R. Ex. 9). The second alleged no call/no show occurred on August 2. (Tr. 263; R. Ex. 9).

Respondent's employee handbook indicates that "an employee who receives two no call/no shows within one year, is subject to disciplinary action including termination." (ALJD 4:10-12; R. Ex. 3). A no call/no show is when an employee fails to call in for a shift at least one hour into the shift and does not appear for his or her scheduled shift. (Tr. 78, 156). However, it also indicates that the penalty for one no call/no show is a written warning. (R. Ex. 3). In terminating Lambert, Respondent cited an alleged no call/no show she received for missing a shift on April 26, as well as an alleged no call/no show for a shift on August 2. (Tr. 263; R. Ex. 9).

Lambert testified that she appropriately handled her shift on April 26 and did not no call/no show for that shift. (Tr. 94). In fact, Lambert testified that she had spoken to Staffing Coordinator, Kerri Demasi, who indicated that she was not a no call/no show in April and that she would be all set. (Tr. 94). Lambert never received a written warning for missing work on April 26, even though the handbook states that a written warning will issue and Steffan testified that is Respondent's practice. (ALJD 7:38-49 (n. 8); Tr. 257, R. Ex. 3). Respondent admits that employees are not paid for no call/no shows. (Tr. 263). Lambert's timecard indicates that she was paid for April 26. (Tr. 268; GC Ex. 11). Steffan testified that the timecard "raises a question

in my mind as to whether it's accurate or not or what's going on here." (Tr. 284). Steffan admits that one no call/no show is insufficient to justify termination. (Tr. 262).

Lambert's car, her only mode of transportation, broke down on Thursday, July 30. (Tr. 83). Lambert was scheduled to work Thursday, Friday, Saturday, and Sunday of that week. On Thursday, before the start of her shift, Lambert spoke to DeMasi to let her know that she would not be able to make her shift. (Tr. 84). In fact, she informed Demasi that she would not be able to make the remaining shifts for the weekend because her vehicle broke. (Tr. 85). While accepting the notice for that night's shift, Demasi refused to remove her from the schedule for the weekend and informed her that she would have to call in before every shift. (Tr. 345). However, Respondent admits that more notice in advance of an absence is better because it gives additional time to find a replacement. (ALJD 7:1-6; Tr. 256).

As instructed, Lambert called again on Friday, July 31, for her shift that day, as her car was still inoperable. (Tr. 84). Again, on Saturday, August 1, Lambert was scheduled to work and had to call out. (Tr. 84-85). This day, she spoke to Sherri Martone and, just as she had explained to Demasi on Thursday, she asked to be taken off the schedule for the following day, Sunday, August 2 as well. (Tr. 85). Martone told her "Okay, that's fine. Hope you get your car trouble fixed." (Tr. 85). At the hearing, Martone was unable to recall what Lambert said about her Sunday, August 2 shift. (Tr. 313). Lambert had to have her car towed to the shop to be repaired, and did not get her car back until Tuesday, August 4. (Tr. 85, 91). Despite having apprised Martone of her absence, on August 3, Lambert was informed that she was being terminated for a no call/no show for Sunday, August 2 in addition to one she had received on April 26. (ALJD 7:8-29; Tr. 78).

Additionally, the ALJ correctly found that Respondent failed to notify or seek to bargain with the Union about the suspension or termination that Lambert received. (ALJD 8:1-2; Tr. 269-70; GC Ex. 1[o]).

B. Introduction

A Complaint and Notice of Hearing in Case 03-CA-153365 issued on August 26. (GC Ex. 1[e]). An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on October 23, based on charges in Cases 03-CA-160251 and 03-CA-153365. (GC Ex. 1[j]). The Complaint was further amended orally at the hearing to allege additional agents and supervisors. The hearing took place in Albany, New York on January 26 and 27, 2016 before Administrative Law Judge (ALJ) Geoffrey L. Carter.

In his decision, the ALJ erred by finding that Respondent's suspension and discharge of Carmel Sparks and Yadira Lambert did not violate Section 8(a)(1) and (5) of the Act. In doing so, the ALJ erred in failing to make a credibility analysis for any of the witnesses, specifically, between discriminatee Yadira Lambert and supervisor Sherri Martone. Moreover, the ALJ also erred in failing to determine whether the suspensions issued to Carmel Sparks and Yadira Lambert were disciplines, and whether the disciplines issued to Carmel Sparks and Yadira Lambert were discretionary. The ALJ also erred in failing to order an appropriate remedy, including reinstatement, backpay, and requiring Respondent to notify and bargain with the Union over the issuance of discretionary discipline. Finally, the ALJ erred in failing to include in the recommended order a make-whole remedy for Carmel Sparks and Yadira Lambert including reimbursement for all search-for-work and work-related expenses regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

III. ARGUMENT

A. The ALJ Failed to Perform a Witness Credibility Analysis. (Exception 1)

ALJs must perform credibility analyses in their decisions. It is well-established Board precedent that credibility issues must be decided at a hearing before an administrative law judge. *Alpha-Omega Electric, Inc.*, 312 NLRB 292, 293 (1993). An ALJ failing to make the necessary credibility determinations for proper consideration of the allegations may result in remanding the case to the ALJ for those determinations. *See e.g.*, *Alcon Fabricators*, 334 NLRB 604, 604 (2001). "Courts have consistently required explicit credibility findings where such credibility is a critical factor in the decision." *St. Francis Medical Center*, 347 NLRB 368, 369 n. 9 (2006), citing *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). Even in circumstances where the ALJ makes an attempt at credibility findings, those findings have been rejected when "the judge gave no reasons for crediting witnesses, and thus the findings 'provide no basis for assessing the relative credibility of the witnesses.'" *St. Francis Medical Center*, supra, at 369 n. 9, quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 666-67 (7th Cir. 1983). Simply making a "boilerplate credibility statement which adds nothing to permit meaningful review" does not cure unsupported findings. *St. Francis Medical Center*, supra, at 369 n. 9, citing *K-Mart Corp. v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995). Credibility determinations must be made by the ALJ when deciding the merits of a case.

In performing his analysis of the case, the ALJ correctly extolled the virtues of making a credibility determination. He explains that there are a variety of factors to be analyzed and that such findings need not be all-or-nothing propositions. (ALJD 8:19-21). However, the ALJ then simply goes on to say "to the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision." (ALJD 8:21-23). In the findings of fact section,

the ALJ never specifically states which witness he credits, which proposition he credits that witness, or why he makes that decision. By failing to make explicit credibility findings, the ALJ did not make an adequate credibility analysis. Such an analysis must be performed prior to a decision being made on the issues.

For example, as explained above, the ALJ cited conflicting versions of the facts between Lambert and Martone surrounding Lambert's request to be taken off the schedule for August 2. (ALJD 7:10-14). Since Lambert was ultimately terminated for the August 2 no call/no show, the ALJ's failure to make explicit credibility findings directly impacts the decision.

However, despite the ALJ's failure to perform a witness credibility analysis, it is respectfully submitted that there is sufficient evidence to find that Respondent's disciplines of Sparks and Lambert were discretionary, in part, due to Respondent's investigations and the fact that there are conflicting versions of the facts regarding each of the disciplines for Sparks and Lambert. Thus, since the disciplines were discretionary, Respondent's failure to notify and bargain with the Union violates Section 8(a)(1) and (5) of the Act.

B. Respondent's Suspension and Discharge of Carmel Sparks and Yadira Lambert Violated Section 8(a)(5) and (1) of the Act. (Exception 2)

1. The ALJ Erred in Failing to find a Violation Based on Board Precedent Independent of *Alan Ritchey*.

It is well settled that an employer violates Section 8(a)(5) of the Act by unilaterally implementing terms and conditions of employment without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). Furthermore, an employer is forbidden from refusing to bargain over mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210, 85 S. Ct. 398, 13

L. Ed. 2d 233 (1964). In that regard, the Board has held that termination of employment is a mandatory subject of bargaining. *In Re N.K. Parker Transportation Inc.*, 332 NLRB 547, 551 (2000).

The Board has held, across a range of terms and conditions of employment, that once an exclusive bargaining agent is selected, the employer may implement changes pursuant to past practices, but must bargain over any discretionary aspects of those changes. *See, e.g., Washoe Medical Center Inc.*, 337 NLRB 202, 202 (2001) (although employer had a practice of placing new employees into wage range quartiles, employer's substantial degree of direction exercised in deciding which range to place employees in required bargaining with the union prior to implementation); *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (employer's recurring unilateral reduction in employees' hours of work required bargaining because there was no reasonable certainty as to the timing and certainty of a reduction in hours); *Adair Standish Corp.*, 292 NLRB 890 n.1 (1989) (employer required to bargain economic layoffs because layoff decision was not based on seniority but rather the employer's assessment of the employees' ability); *Oneita Knitting Mills*, 205 NLRB 500, 500 (1973) (while employer was obligated to maintain its merit increase program, employer was required to bargain the timing and amount of such increases).

Thus, there is ample Board precedent upon which the ALJ should have relied, independent of *Alan Ritchey*, to find that Respondent violated the Act when, following the employees' selection of the Union as their collective bargaining representative, and prior to any agreement on a grievance procedure, it exercised its discretion to discipline Carmel Sparks and Yadira Lambert without notice to or bargaining with the Union.

2. The ALJ Erred in Failing to Apply the Rationale of *Alan Ritchey* to find that the disciplines issued to Carmel Sparks and Yadira Lambert violated the Act.

While, as set out above, the Board's requirement that employers bargain the discretionary aspects of their unilateral changes once employees select a bargaining representative is nothing new, in *Alan Ritchey, Inc*., 359 NLRB No. 40 (Dec. 14, 2012), the Board further defined to what extent an employer must bargain about certain types of discretionary disciplinary action, once a bargaining representative is selected. Specifically, the Board held that during the period after a union is recognized, in the absence of a first contract or interim grievance procedure, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion or discharge. *Id.*, slip op. at 1-2, 8-10.

When the duty is triggered, the employer's obligation is to simply provide the union with sufficient advance notice to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline and the extent to which the decision involves an exercise of discretion. *Id.* at 11. After providing notice and opportunity to bargain, the employer need not bargain to agreement or impasse before it implements its decision, so long as it bargains to impasse or agreement after it implements. *Id.*

Finally, in exigent circumstances, i.e., the employer has a reasonable belief the employee's continued presence on the job poses a serious, imminent danger to the employer's business or personnel, the employer can immediately suspend the employee, provided that it promptly provides the union with notice and an opportunity to bargain over the decision and its effects. *Id.* at 10-11.

The Board's decision in *Alan Ritchey* was a casualty of *Noel Canning*,[3] and as such, is no longer considered binding precedent. The *Alan Ritchey* Board decision happened to be one of

[3] *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

hundreds of Board decisions which were invalidated because the Supreme Court found that the President's recess appointees who rendered those decisions were not lawfully appointed, and as such, that the Board lacked a proper quorum between January 4, 2012 and August 3, 2013, during which time the *Alan Ritchey* decision issued. However, the Board's decision in *Alan Ritchey* itself has never been the subject of any decision by the Supreme Court. In *Noel Canning*, the Supreme Court's decision did not speak at all to the Board's application of existing Board precedent to the facts in *Alan Ritchey*, nor to the analysis of those cases in laying out the rationale of *Alan Ritchey*. Therefore, in describing what the Supreme Court actually held in *Noel Canning* as it relates to *Alan Ritchey*, *Alan Ritchey* could otherwise be described as a case which, by virtue of *Noel Canning*, has been "reversed on other grounds," because it is a situation in which a "higher court reversed the lower court's decision, *but for reasons other than the proposition for which [one has] cited the decision*[4]" (emphasis added).

In *South Lexington Management Corp.*,[5] ALJ William N. Cates made the crucial distinction between relying on a case as precedent versus relying on the rationale of an invalidated case, holding,

> *Alan Ritchey* has no precedential value because the Board's decision in that case became invalid due to constitutional considerations in *Noel Canning*, 134 S.Ct. 2550 (2014). In fact, the *Alan Ritchey* case has, since *Noel Canning* issued, been closed by the Board. Although *Alan Ritchey* has no precedential value, I, nonetheless, adopt the Board's *Alan Ritchey* rationale, as I find it independently persuasive.

In fact, numerous ALJs have relied upon and adopted the *Alan Ritchey* rationale, rather than to "mechanically apply prior doctrine,"[6] or to rely on a "demonstrably incorrect"[7]

[4] *See, e.g.*, *Legal Research, Writing and Civil Litigation*, National Paralegal College (http://nationalparalegal.edu/public_documents/courseware_asp_files/researchLitigation/LegalResearch/CiteChecking.asp).
[5] JD(ATL)–02–15, 2015 WL 400624 (N.L.R.B. Div. of Judges) (Jan. 29, 2015).

prior Board decision. *TGF Management Group Holdco Inc.*, JD(NY)-05-15, 2015 WL 194519 (N.L.R.B. Div. of Judges) (Jan. 15, 2015) (applying *Alan Ritchey* to find obligation to bargain over discharge of an employee without discussing invalidation under *Noel Canning*); *Latino Express, Inc*., JD(SF)-09-15, 2015 WL 1205363 (N.L.R.B. Div. of Judges) (March 17, 2015) (adopting *Alan Ritchey* despite acknowledging lack of precedential value for "independent reasons"); *Ridgewood Health Care Center, Inc*., JD-20-15, 2015 WL 1440964 (N.L.R.B. Div. of Judges) (March 27, 2015) ("Although a nullity pursuant to the Supreme Court's decision in *Noel Canning*, 134 S. Ct. 2550 (2014), the Board's rationale in *Alan Ritchey*, 359 NLRB No. 40 (2012), since closed, provides some guidance" on the issue of both company obligation to bargain and appropriate remedy); *SMG Puerto Rico II LC*, JD(ATL)-07-15, 2015 WL 1756217 (N.L.R.B. Div. of Judges) (April 17, 2015) (adopting *Alan Ritchey* rationale as "independently persuasive" to find bargaining obligation regarding employee discharges, rejecting reliance on *Fresno Bee*); *Kitsap Tenant Support Services, Inc*., JD(SF)–29–15, 2015 WL 4709436 (N.L.R.B. Div. of Judges) (July 28, 2015) (relying on *Alan Ritchey* to find pre-imposition obligation to bargain over discipline to four employees); *Western Cab Company*, JD(SF)-33-15, 2015 WL 5159229 (N.L.R.B. Div. of Judges) (Sep. 2, 2015) (discretionary suspension and termination of numerous employees without first bargaining with the union held unlawful under *Alan Ritchey* doctrine, describing *Alan Ritchey* as "subsequently rendered null and void ab initio" by *Noel Canning*).

Moreover, the ALJ in the instant case went so far as to rely on *The Fresno Bee*, 339 NLRB 1214 (2003), in dismissing the allegations. (ALJD 10:2-7). The ALJ stated "I find that

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[6] *Kitsap Tenant Support Services, Inc*., JD(SF)–29–15, 2015 WL 4709436 (N.L.R.B. Div. of Judges) (July 28, 2015) at 2.
[7] 359 NLRB No. 40, slip op. at 7 (2012).

under *Fresno Bee*, Respondent did not have a duty to notify and bargain with the Union before administratively suspending Lambert and Sparks in 2015, or before discharging Lambert and Sparks in 2015." (ALJD 10:4-6).

In *South Lexington Management Corporation*, JD(ATL)–02–15, 2015 WL 400624 at 13, ALJ Cates convincingly addressed the employer's argument that because *Alan Ritchey* was no longer valid precedent, the Board's decision in *Fresno Bee* was controlling.

The Board placed an exclamation point on its rationale in *Alan Ritchey* on the demonstrably incorrect conclusion the trial judge in *Fresno Bee* had arrived at by:

> As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale-the only rationale articulated-was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee.* See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation.") To the extent *Fresno Bee* contradicts our conclusion here, it is overruled. [footnote omitted].
>
> Here, I reject the Company's contention *Fresno Bee* is controlling and rather adopt the Board's *Alan Ritchey* rationale that an employer has a preimposition obligation to bargain over discretionary discipline at a time when the parties have not arrived at a first contract or an interim grievance procedure and the concerns involve mandatory subjects of bargaining.

For the reasons set out by ALJ Cates in *South Lexington*, the Board in this case should reverse the ALJ's mechanical reliance on *Fresno Bee*, a case which the Board has clearly indicated was wrongly decided, notwithstanding the precedential issues with *Alan Ritchey*.

In the instant case, as correctly found by the ALJ, Sparks and Lambert were suspended and discharged after the Union won the election and prior to any agreement on a grievance procedure; and Respondent suspended and discharged Sparks and Lambert without notice to or bargaining with the Union. (ALJD 5:17-18, 8:1-2). The ALJ should have applied the

rationale set out in the Board's *Alan Ritchey* decision, "notwithstanding *Alan Ritchey's* invalidation by the Supreme Court, which it did not on the basis that the Board had misinterpreted the Act, but rather on constitutional grounds unrelated to the merits of the case." *Western Cab Company*, supra, slip op. at 4.

C. The ALJ Failed to Decide Whether the Disciplines issued to Carmel Sparks and Yadira Lambert were Discretionary. (Exception 3)

As part of its rationale in *Alan Ritchey*, the Board analyzes a violation of Section 8(a)(1) and (5) of the Act by determining whether the disciplines issued to employees were discretionary. It logically follows that such a determination of discretion must be made by the ALJ when deciding whether an employer violated the Act. In making that determination, simply following a past practice of disciplining employees does not establish a lack of discretion. *Alan Ritchey*, 359 NLRB No. 40, slip op. at 10. Rather, if the employer reserves the right to determine what employee misconduct warrants disciplinary action that is sufficient to establish discretion. *Id.* Similarly, an employer determining the nature and severity of an offense when imposing discipline is satisfactory to establish discretion. *Id.* at 10-11.

Here, the foundational issue is that the ALJ failed to make any determination on discretion. In his decision, the ALJ specifically states "as the findings of fact indicate, the parties presented evidence in this case on a number of issues including: whether Baptist Health exercised discretion when it administratively suspended Lambert and Sparks; …and whether Baptist Health exercised discretion when it terminated Lambert and Sparks." (ALJD 8:34-37). The ALJ refused to address these issues.

However, had the ALJ addressed these issues, he would have found that the disciplines issued were discretionary. First, Sparks' unpaid suspension and eventual termination were discretionary. Steffan admits that he had to perform an investigation because "there were some

questions of fact here" that Respondent "would need to take some time to look into." (Tr. 179, 242). Steffan also performed an investigation to establish whether Sparks' actions were based on "good cause." (Tr. 159, 239). Resolving those issues of fact and determining "good cause," by their very nature, require discretion.

Similarly, Lambert's unpaid three week suspension required discretion. The record established questions of fact surrounding the incident for which she was suspended. Respondent was investigating an allegation of insubordination. (Tr. 247). Insubordination is included in the employee handbook as conduct that results in immediate termination. (R. Ex. 3). Lambert was eventually recalled from her suspension, meaning her version of events was credited. (Tr. 76-77, 203, 246, 248, 254; GC Ex. 10). Her eventual recall implies discretion in determining the extent of the discipline and about whether it was necessary in the first instance. Despite being recalled to work, Lambert was never paid for the time she missed. (Tr. 203). The practical effect of an unpaid suspension on an employee is discipline, regardless of Respondent's alleged motivation for doing so.

Additionally, Lambert's termination was also discretionary. Though Respondent argues that no call/no show terminations are based on a set handbook policy, Steffan testified that the handbook is only a guideline. (Tr. 229). What the handbook lists as terminable offenses, Steffan describes as a nonexclusive "list to items that are serious enough and infractions that **could** result in immediate termination." (Tr. 153, emphasis added). Moreover, even by this policy, an employee would need **two** no call/no shows in a year. (emphasis added). The record establishes significant doubt as to whether Lambert even had one no call/no show.

With respect to the alleged no call/no show on April 26, Lambert was paid for work on that date. (Tr. 268; GC Ex. 11). Steffan testified that no call/no shows are unpaid. (Tr. 263).

Second, Lambert testified that DeMasi had cleared her for that day and that she would no longer be listed as a no call/no show for that date. (Tr. 94). Third, the handbook reveals that an employee should receive a written warning for their first no call/no show. (R. Ex. 3). Lambert never received such a warning. Thus, the record reveals the distinct likelihood that Lambert did not have a no call/no show in April.

The record also reveals that Lambert called in for her shift on August 2 on two separate occasions. She first notified DeMasi on Thursday, July 30, that she would be unable to attend her weekend shifts because she was having car trouble. (Tr. 345). Respondent admits that more notice is better so that a replacement can be found. (Tr. 256). Regardless, Respondent refused to accept her notice for the entire weekend on Thursday. (Tr. 345). Lambert then spoke to Martone on Saturday about her shift for the following day. (Tr. 85). Lambert again indicated that she would be unable to attend because she still had no car. According to Lambert, Martone approved her notice, saying "Okay, that's fine. Hope you get your car trouble fixed." (Tr. 85). Lambert's termination was ripe for bargaining with the Union because Lambert and Martone's version of events differ. One no call/no show is insufficient to justify termination. There remains a serious question of fact about whether Lambert had even one no call/no show. Thus, there was discretion used in evaluating whether she was even a no call/no show for April 26 or August 2.

D. The ALJ Failed to Decide Whether an Administrative Suspension is Discipline. (Exception 4)

While not explicitly analyzed as part of its rationale in *Alan Ritchey,* the Board made an implicit determination about whether the action issued to the employees was discipline or not. This determination was fundamental to the decision issued in that case, particularly in analyzing the discretionary nature of that discipline. Here, the ALJ failed to make a determination about whether an administrative or investigatory suspension is considered discipline. In his analysis,

the ALJ simply stated "As the findings of fact indicate, the parties presented evidence in this case on a number of issues, including: …whether the decision to administratively suspend an employee qualifies as a disciplinary suspension." (ALJD 8:33-37). He went on to say "I need not resolve those issues here." (ALJD 8:37-38). However, this issue must be resolved as it is fundamentally intertwined with the analysis of this type of case.

By its nature, an unpaid administrative or investigatory suspension is discipline. *Berthold Nursing Care Center, Inc.*, 351 NLRB 27 (2007) (holding that LPN effectively recommended discipline because she had the authority to suspend CNAs without pay, pending investigation). The act of refusing to pay an employee for a set period of time while an investigation is performed, regardless of outcome, results in lost income that would otherwise have been earned. The Board has decided that such a disciplinary action should result in backpay. *LaGuadia Associates*, 357 NLRB No. 95 (2011) (issuing backpay for suspensions pending investigation).

Accordingly, the suspensions Respondent issued to Sparks and Lambert were disciplinary and should be treated as such. But, even if the suspensions were not disciplinary, those actions related to the employees' wages, hours, and other terms and conditions of employment. Thus, even if the suspensions of Sparks and Lambert were not disciplinary in nature, Respondent still unilaterally implemented an unpaid suspension. Implementing those discretionary measures affecting wages are mandatory subjects of collective bargaining.

E. Carmel Sparks and Yadira Lambert are entitled to Reinstatement and a Make-Whole Remedy and the ALJ should have made that Determination. (Exceptions 5-6)

1. Board Precedent Requires a Make-Whole Remedy. (Exception 5)

Where an employer violates Section 8(a)(5) by unilaterally changing terms and conditions of employment, the Board orders the employer to restore the *status quo ante* by, among other things, reinstating and making whole discharged employees and rescinding

discipline where the discharges or discipline resulted from the unlawful unilateral change. *See, e.g., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216–17 (1964) (approving Board order requiring employer to resume maintenance operations and reinstate employees after it violated Section 8(a)(5) by failing to bargain with union over contracting out those operations); *Carey Salt Co.*, 358 NLRB No. 124, slip op. at 1, n.3 (Sept. 12, 2012) (ordering employer to reinstate and make whole any employees who may have lost their employment as a result of unilateral changes implemented when parties were not at a valid impasse); *Alta Vista Regional Hospital*, 355 NLRB 265, 268 (2010) (ordering employer to reinstate and make whole employees discharged as a result of unilateral change in practice concerning fit tests); *Uniserv*, 351 NLRB 1361, 1361 n.1, 1362 (2007) (ordering reinstatement and make-whole remedy for employees discharged under unilaterally implemented "zero tolerance" drug testing policy unless employer could prove employees would have been discharged under preexisting policy); *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618–19 (2007) (ordering employer to rescind discipline imposed on driver pursuant to unilaterally implemented change in policy prohibiting employees from taking home truck keys).

On December 14, 2012, the Board decided *Alan Ritchey, Inc.*, requiring employers whose employees are represented by a labor organization, but have yet to reach a collective-bargaining agreement, to provide the Union notice and an opportunity to bargain before issuing certain discretionary discipline. *Alan Ritchey, Inc.*, 359 NLRB No. 40 (December 14, 2012). As the ALJ noted in this case (ALJD 9:26-31), the Board declined to apply its ruling retroactively because at the times relevant to the complaint, Board precedent had not clearly and directly addressed the issue of an employer's obligation to bargain before issuing discretionary discipline. *Alan Ritchey*, 359 NLRB No. 40, slip op. at 16. Therefore, retroactive application

could have caught employers by surprise and potentially exposed them to financial liability. *Id.*

However, at this point, it would be inappropriate to apply the holding of *Alan Ritchey* only prospectively and not retroactively. In the *Alan Ritchey* decision, the Board was hesitant to do so, saying, "Although the issue here is a close one, we believe that the controlling factors weigh against retroactive application." 359 NLRB No. 40. at 11. It may have been a close case at the time *Alan Ritchey* was decided, but it certainly cannot said to be so now. In *Alan Ritchey*, the Board articulated its bargaining rules for pre-imposition discretionary discipline and dismissed the complaint allegations regarding discretionary discipline because it was applying its ruling prospectively. *Alan Ritchey, Inc*., 359 NLRB No. 40, slip op. at 15. Accordingly, no remedy was provided. *Id*., slip op. at 18. But in this case, Respondent's refusal to notify or bargain with the Union regarding the suspension and eventual discharge of employees Carmel Sparks and Yadira Lambert occurred nearly two years after the Board's *Alan Ritchey* decision. Respondent was thus on notice of its obligations and chose to simply ignore what it knew the Board would require it to do. At the very least, Respondent acted at its peril, and the discharged employees should not have to pay the price for Respondent's unlawful conduct. A make-whole remedy is necessary in this case to prevent Respondent from retaining the fruits of its unlawful conduct, and to offset the effects of the unfair labor practice on the Union's bargaining position. See, e.g., *Beacon Piece Dyeing and Finishing Co., Inc*., 121 NLRB 953, 963 (1958); *Die Supply Corporation*, 160 NLRB 1326, 1344 (1966). Moreover, Respondent should be ordered to notify and bargain with the Union over the issuance of the discretionary discipline. Thus, should the Board agree that Respondent violated the Act by disciplining Carmel Sparks and Yadira Lambert in violation of Section 8(a)(1) and (5) of the Act, it should also order the traditional remedy, including "an affirmative bargaining order,

accompanied by the usual cease-and-desist order and the posting of a notice." *Fallbrook Hospital Corporation d/b/a Fallbrook Hospital*, 360 NLRB No. 73 (April 14, 2014).

2. The Make-Whole Remedy Should Include Reimbursement for All Search-For-Work and Work-Related Expenses, Regardless of Whether Interim Earnings were in Excess of these Expenses during the Backpay Period. (Exception 6)

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc*., 112 NLRB 371, 374 (1955); *Crossett Lumber Co*., 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment;[8] the cost of tools or uniforms required by an interim employer;[9] room and board when seeking employment and/or working away from home;[10] contractually required union dues and/or initiation fees, if not previously required while working for respondent;[11] and/or the cost of moving if required to assume interim employment.[12]

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co*. 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."). *See also N. Slope Mech*., 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who

[8] *D.L. Baker, Inc*., 351 NLRB 515, 537 (2007).
[9] *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co*., 151 NLRB 1113, 1114 (1965).
[10] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).
[11] *Rainbow Coaches*, 280 NLRB 166, 190 (1986).
[12] *Coronet Foods, Inc*., 322 NLRB 837 (1997).

incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work,[13] but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp*., 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Int'l Union, Local 32bj*, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions--i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity

[13] *In Re Midwestern Pers. Servs., Inc*., 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

Commission and the United States Department of Labor. See *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed. Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole . . ." *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[14] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp*., 356 NLRB No. 8 at * 1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

In *Alan Ritchey*, the Board clearly contemplated these remedies on a prospective basis. As noted above, the *Alan Ritchey* Board's rationale for not applying its holding retroactively was that it could impose an unexpected backpay burden on employers. It is no longer unexpected. More importantly, if reinstatement, backpay, and the other standard remedies for unlawful discharges were not imposed, employers would have no incentive to engage in pre-imposition

[14] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953).

bargaining over discipline. Accordingly, Respondent should be required to restore the status quo by bargaining and providing backpay and reinstatement to affected employees.

IV. CONCLUSION

For all the reasons set forth above, General Counsel respectfully requests that the Board grant the General Counsel's Exceptions to the Decision of the Administrative Law Judge and issue an appropriate order that Respondent be found to have violated Section 8(a)(1) and (5) of the Act, as discussed above.

DATED at Buffalo, New York, this 8th day of April, 2016.

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